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APR 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

NO. 675

GEORGE MOORE ICE CREAM COMPANY, *Petitioner,*

v.

J. T. ROSE, Collector of Internal Revenue for the District of Georgia, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE.

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INDEX.

PAGE

Motion for Leave to File Brief as Amici Curiae.... 1

The Question Presented 4

Summary of Argument 4

Argument—

Section 3226 R. S., as amended, permits this suit to be maintained although the tax was not paid under protest or duress.... 4

Table of Citations.

CASES.

Arnson v. Murphy, 109 U. S. 238 20

Arthur v. Cumming, 91 U. S. 362 15

Beatty v. Heiner, 10 F. (2d) 390; 17 F. (2d) 143; 276 U. S. 598 .....8, 12

Beley v. Naphtaly, 169 U. S. 353 16

Boston & P. R. Corporation v. Gill, 257 Fed. 221... 24

Bowers v. New York & Albany Lighterage Co., 273 U. S. 346 15

Brown v. Maryland, 12 Wheat. (25 U. S.) *419.... 14

Burnet v. Guggenheim, 53 S. Ct. 369 15

Campbell v. Iron-Silver Mining Co., 83 Fed. 643...17, 18

Camunas v. N. Y. & P. R. S. S. Co., 260 Fed. 40.... 17

Cary v. Curtis, 3 How. (44 U. S.) *236 20

Chase v. Erhardt, 198 Fed. 305..... 17

Clift & Goodrich, Inc., v United States, C. C. H. 1931, Vol. III, par. 9439, par. 9492; 56 F. (2d) 751; 53 S. Ct. 17 11

DuPuy, Amy H., v. United States, 68 C. Cls. 574; 35 F. (2d) 990; 281 U. S. 739..... 9

DuPuy, Herbert, v. United States, 67 C. Cls. 348; 35 F. (2d) 990, 281 U. S. 739 9

PAGE

Electric Storage Battery Co. v. McCaughn, 52 F. (2d) 205; C. C. H. 1933, Vol. III, par. 9098.... 11
Farmers Loan & Trust Co. et al. v. United States, 64 C. Cls. 516 9
Fullerton-Kreuger Lumber Co. v. Northern Pacific Railway Co., 266 U. S. 435..... 19
Gould v. Gould, 245 U. S. 151..... 15
Harrison v. Lewellyn, 28 F. (2d) 990; 35 F. (2d) 283 12
Harvey Co., Arthur C., v. Malley, No. 537 October Term, 1932 12
Hyatt Roller Bearing Co. v. United States, 70 C. Cls. 443; 43 F. (2d) 1008..... 10
James v. Hicks, 110 U. S. 272..... 23
Jones v. H. D. & J. K. Crosswell, Inc., 60 F. (2d) 827 15
Kinney v. Conant, 166 Fed. 720; 214 U. S. 526..... 21
Larkin v. Saffarans, 15 Fed. 147..... 17
Mellon v. United States ex rel. Hill, 37 F. (2d) 609. 15
Mellon v. United States ex rel. Orono Pulp & Paper Co., 50 F. (2d) 1007..... 24
Miceli v. Morgano, 36 F. (2d) 309..... 18
Moses v. United States, 61 F. (2d) 791.....12, 14
National Lead Co. v. United States, 252 U. S. 140... 7
Nichols v. Leach, 42 F. (2d) 918; 50 F. (2d) 787; 285 U. S. 165..... 10
Ohio Locomotive Crane Co. v. Nauts, C. C. H. 1932, Vol. III, par. 9437..... 12
Old Colony R. Co. v. Commissioner, 284 U. S. 552... 7
Public Service Corporation of New Jersey v. Herold, 273 Fed. 282; 279 Fed. 352; 229 Fed. 902..... 23
Rasmussen v. Brownfield-Canty Carpet Co., 31 F. (2d) 89 .....12, 13
Regla Coal Co. v. Bowers, 37 F. (2d) 373..... 20
Ritter v. United States, 28 F. (2d) 265..... 22
Sage v. United States, 250 U. S. 33..... 23

PAGE

Sampeyreac v. United States, 7 Pet. (32 U. S.) *222 17
Seaman v. Bowers, 297 Fed. 371 17
Semple & Co. v. Lewellyn, 1 F. (2d) 745 12
Skinner v. Eaton, 45 F. (2d) 568; 283 U. S. 837 24
Soper v. Hammond Lumber Co., 4 F. (2d) 872 17
Taylor v. Treat, 143 Fed. 656 24
Tucker v. Alexander, 275 U. S. 228 21
United States v. Abatoir Place, 106 U. S. 160 19
United States v. Arredondo, 6 Pet. (31 U. S.) *691.. 15
United States v. Emery, etc., Co., 237 U. S. 28 20
United States v. Farrar, 281 U. S. 624 7
United States v. Frerichs, 22 Fed. 637; 124 U. S. 315 .....19, 20
United States v. Merriam, 263 U. S. 179 15
United States v. Updike, 281 U. S. 489 15
Virginia Coupon Cases, 25 Fed. 666 16
Warner v. Walsh, 24 F. (2d) 449; 15 Fed. (2d) 367; 10 F. (2d) 155; 27 F. (2d) 9512 .....8, 19, 23
Weir v. Dean, 52 F. (2d) 201; 41 F. (2d) 1021 10
Weir v. McGrath, 52 F. (2d) 201; 41 F. (2d) 1021 .. 10
Willard Storage Battery Co. v. Routzahn (Dec. 16, 1929, N. D., Ohio, unpublished) 11
Winant v. Gardner, C. C. H. 1928, Vol. III, par. D-8118, par. D-8376; 29 F. (2d) 836 .....9, 18
Wourdack v. Becker, 55 F. (2d) 840; 286 U. S. 548.. 12

STATUTES.

Act of March 3, 1839 (Ch. 82 § 2) 20
Act of June 13, 1898 (30 Stat. 440) 23
Act of July 27, 1912 (37 Stat. 240) 23
Act of March 4, 1923, c. 276 § 2 (42 Stat. 1505) ...21, 23
Judicial Code § 177 United States Code Tit. 28, § 284 .....21, 24

PAGE

Revenue Act of 1916 (39 Stat. 756)
§ 14 (a) 23

Revenue Act of 1918 (40 Stat. 1057)
§ 252 21

Revenue Act of 1921 (42 Stat. 227)
§ 252 ..... 13, 21
§ 1318 23
§ 1319 23

Revenue Act of 1924 (43 Stat. 343)
§ 281 (e) 22
§ 1014 4
§ 1014 (a) 23
§ 1014 (b) 14
§ 1015 23
§ 1100 13

Revenue Act of 1926 (44 Stat. 9)
§ 284 (g) 22
§ 1113 (a) 4, 5, 7, 14, 15, 18
§ 1113 (b) 14
§ 1117 24

Revenue Act of 1928 (45 Stat. 791)
§ 615 21
§ 615 (a) 24

Revenue Act of 1932 (47 Stat. 173)
§ 1103 7

Revised Statutes
§ 989, United States Code, Tit. 28, § 842 19
§ 3210, United States Code, Tit. 26, § 140 20
§ 3220, United States Code, Tit. 26 § 149 ..... 19, 22
§ 3226, United States Code, Tit. 26, § 156 ..... 4, 5
§ 3227, (repealed) 23
§ 3228, United States Code, Tit. 26, § 157 21

REGULATIONS.

	PAGE
Regulations 62, Art. 1031 (a)	22
Regulations 65, Art. 1302	22
Art. 1351	7
Art. 1352	23
Regulations 69, Art. 1351	7
Regulations 74	7
Regulations 77	7

RULINGS.

Treasury Decision 4210, C. B. VII-2, p. 338	10

MISCELLANEOUS.

Blackstone, Commentaries on the Laws of England (Cooley, 4th ed. Vol. I)	17
Broom, Legal Maxims	15
Corpus Juris, Vol. 59, pp. 1174-1175	18
Holmes, Federal Taxes, 6th ed. (1925)	6
House Rep. No. 179, 68th Cong. First Sess., pp. 33-34	16
Klein, Federal Income Taxation (1929)	6
Lewis' Southerland Statutory Construction (2nd Ed.) Vol. II, p. 1226	18
Montgomery, Income Tax Procedure (1925)	5, 6
(1926), (1927)	6
Montgomery, Federal Tax Practice (1929)	6
Sen. Rep. No. 398, 68th Cong., First Sess., p. 44	16

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

May it please the Court:

The undersigned respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae.*

JOHN G. BUCHANAN,
PAUL G. RODEWALD,
Amici Curiae.

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BRIEF OF AMICI CURIAE.

This case turns on whether the amendment of Section 3226 of the Revised Statutes (U. S. C. A., Title 26, Section 156) made by Section 1014 of the Revenue Act of 1924, 43 Stat. 343, is applicable to suits thereafter brought to recover taxes paid without protest or duress before the passage of that Act. Among the suits against Collectors or against the United States which will be affected by the decision in this case is the suit of our client, and this brief is accordingly submitted, with the consent of counsel, in support of the position that the suit in the case at bar was maintainable without alleging or proving payment of the tax under protest or duress.

The Question Presented.

Whether a suit brought March 28, 1931, to recover an internal-revenue tax may be maintained against a Collector of Internal Revenue who collected the tax prior to June 2, 1924, the effective date of the Revenue Act of 1924, without alleging or proving that the tax was paid under protest or duress.

Summary of Argument.

Section 3226 R. S., as amended by Section 1014, Revenue Act of 1924 (43 Stat. 343), reenacted without change by Section 1113 (a), Revenue Act of 1926 (44 Stat. 9), permits this suit to be maintained although the tax was not paid under protest or duress. The construction of this section contended for by the Government, as not applying to taxes paid prior to the enactment of the Revenue Act of 1924, is contrary to the great weight of authority and to the plain intent of Congress. It is a construction of a tax statute in a manner which is illiberal to all taxpayers. It applies a procedural statute so as to perpetuate the evil intended to be cured. It is based on considerations of supposed rights of Collectors which are insubstantial or nonexistent. Congress having left these supposed rights out of account in other important respects, it did not intend them to be taken into account in this respect.

Argument.

SECTION 3226 R. S. AS AMENDED PERMITS THIS SUIT TO BE MAINTAINED ALTHOUGH THE TAX WAS NOT PAID UNDER PROTEST OR DURESS.

It is significant that the payment on November 5, 1923, of the tax involved in this suit (R. 3) is the only event material to the action or mentioned in Section 3226 R. S. which took place prior to the enactment of the Revenue Act of 1924. The claim for refund was filed November 7, 1927, and was rejected September 8, 1929 (R. 5.) The amended petition was filed March 28, 1931, and does not allege payment under protest (R. 6). The Circuit Court of Appeals suggests, but does not decide, that because the tax was not so paid, the plaintiff may not recover, although Section 3226 R. S. as reenacted by Section 1113 (a), Revenue Act of 1926, provides that a suit for the recovery of an internal revenue tax may be maintained "whether or not such tax, penalty or sum has been paid under protest or duress". The reason given is that the tax was paid before June 2, 1924, the date of the amendment introducing the language quoted into Section 3226 R. S., and that that section as thus amended therefore does not apply. This conclusion is contrary to the great weight of authority.

It has not been doubted by the textwriters that Section 3226 R. S. as amended obviates the necessity for payment under protest or duress of any tax the suit to recover which is brought after the enactment of the Revenue Act of 1924.[1] *Montgomery, Income Tax Pro-*

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(1) Montgomery, op. cit., says, at p. 395:

"Under the present section, as now amended, suits instituted subsequent to June 2, 1924 (the date of approval of the 1924 law), may now be maintained, whether or not the tax, penalty or sum has been paid under protest or duress."

cedure (1925), pp. 352, 395; *Klein, Federal Income Taxation* (1929), p. 1648. Holmes (*Federal Taxes,* 6th ed., 1925) says (pp. 1533-1534):

> "The present law specifically provides that in the case of all suits commenced subsequent to the enactment of the 1924 act, taxes may be recovered whether or not they were paid under protest or duress. As to taxpayers who prior to the enactment of the present law filed suits to recover taxes paid without protest and under no duress the necessity of protest and duress as a prerequisite to suit is still an open question. This discrimination has to a considerable extent been avoided by the action of the Court of Claims in permitting taxpayers to discontinue actions commenced prior to the enactment of the present law and to commence new actions."

Not only the contemporary textwriters and the Court of Claims but apparently the Commissioner of Internal Revenue and the Secretary of the Treasury are

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At p. 352 the learned author states:

> "In those suits which were pending on June 2, 1924, for the recovery of excess tax payments the defense of non-protest possibly still will be invoked, if appropriate. Except in those instances in which the statute of limitations has run, the defect may be cured by dismissing the present action and reinstituting suit."

These statements are repeated in later editions. (1926) Vol. 1, pp. 388 and 336 respectively; (1927) Vol. 2, pp. 366 and 106 respectively; (1929) (Federal Tax Practice), pp. 425 and 126-127 respectively. Klein, op. cit., after commenting on the burdensome character of the older rule, says (p. 1648):

> "But, fortunately, these problems are solely of historical interest. Protest is a thing of the past. The 1924 Act completely abolished the necessity of protest as a prerequisite to recovery of overpayment in actions commenced after its enactment. The sole inquiry is whether the taxpayer has overpaid his tax liability; not whether he has performed a certain ritual."

of the opinion that Section 3226 R. S. as amended applies to all actions subsequently brought. Regulations 65, Article 1351, promulgated under the Revenue Act of 1924, provides, without in any way limiting the generality of the language:

> "Payment of the tax, penalty or other sum under protest or duress is not a prerequisite to the bringing of such suit or proceeding."(2)

It must be assumed that Congress was aware of the uniform construction given by the bar and the Government to Section 3226 R. S. as amended by the 1924 Act. The reenactment without change, by Section 1113, Revenue Act of 1926, of Section 3226 R. S. as thus amended indicates that Congress was content with that construction. It significantly left the law in that form. *National Lead Company v. United States,* 252 U. S. 140, 146 (1920, Clarke, J.); *United States v. Farrar,* 281 U. S. 624, 634 (1930, Sutherland, J.); *Old Colony R. Co. v. Commissioner,* 284 U. S. 552, 557 (1932, Roberts, J.).

In view of the general opinion of the officers of the Government that in suits brought after June 2, 1924, it was not necessary to show payment of the tax under protest or duress, it is not to be doubted that many judgments were recovered both against Collectors and against the United States which should not have been recovered if the position of the Government in the case at bar is sound. The history of those few decisions in which the point was raised during the period of more

(2) This language is repeated in Reg. 69, Art. 1351, promulgated under the Revenue Act of 1926. Reg. 74, promulgated under the Revenue Act of 1928, contains no corresponding provision, Section 3226 R. S. not having been amended or reenacted by that Act. Section 3226 R. S. was again amended by Section 1103 of the Revenue Act of 1932, but in a respect not here material. Reg. 77, promulgated under that Act, contains no article corresponding to Art. 1351, Reg. 65.

than eight years which has elapsed since the amendment went into effect shows a general acquiescence by the Government in decisions against it and a growing weight of authority in favor of the taxpayer.

The point first appears in *Beatty v. Heiner,* 10 F. (2d) 390 (W. D. Pa., 1925, Schoonmaker and Thomson, D. JJ.), where it was decided in favor of the taxpayer. ~~It was not argued on appeal, on behalf of the Collector, that the decision was wrong on this point.~~ The Circuit Court of Appeals for the Third Circuit, reversing the judgment on the merits, ~~made no mention of~~ expressed no opinion on the point. *Heiner v. Beatty,* 17 F. (2d) 743 (1927, Woolley, Circ. J.). The point was not relied on before this court, which affirmed the judgment. *Beatty v. Heiner,* 276 U. S. 598 (1927, per curiam).

In *Warner v. Walsh,* 24 F. (2d) 449 (D. Conn., 1927, Thomas, D. J.), the position of the taxpayer on this point was sustained. Apparently no appeal was taken. The case had previously gone to the Circuit Court of Appeals for the Second Circuit, which, in an opinion by Circuit Judge Mack, reported at 15 F. (2d) 367 (1926), had reversed the judgment of the District Court, reported at 10 F. (2d) 155 (1926). The point as to protest and duress was not raised until the case came up in the District Court for the second time. Mrs. Warner sued the same Collector to recover taxes for later years, but the District Court, by Burrows, D. J. (27 F. (2d) 952, (1928)), gave judgment for the defendant, on the ground that Section 3226 R. S. as amended did not apply to suits to recover taxes paid prior to the enactment of the Revenue Act of 1924. The taxpayer appealed and was ultimately given her money, the Government, as we are informed, having confessed error. Undoubtedly this action was taken because of

the contrary opinion of the Circuit Court of Appeals for the Second Circuit in *Winant v. Gardner,* discussed below.

In *Winant v. Gardner,* Commerce Clearing House, Federal Tax Service, 1928, Vol. III, par. D-8118 (E. D. N. Y.), the court had rendered judgment against a taxpayer on the ground that the taxes sued for had been paid without protest. The Circuit Court of Appeals for the Second Circuit, in an opinion by Circuit Judge L. Hand, reversed the judgment on the ground that although the suit had been brought in 1923 the provision of Section 3226 R. S. as amended eliminated the requirement for proof of duress and protest. C. C. H., 1928, Vol. III, par. D-8376. Upon application for reargument, however, the court noted that subdivision (b) of the amending section made it inapplicable to pending cases. It therefore withdrew its former opinion and affirmed the judgment. *Winant v. Gardner,* 29 F. (2d) 836 (1928). The court concluded its per curiam opinion with the remark:

> "Happily such a situation can no longer arise, but we have no power to compel the defendant to concede what justice would seem to demand."

In *Farmers Loan & Trust Co. et al. v. United States,* 64 C. Cls. 516 (1928, Graham, J.), the Court of Claims held, four judges sitting, that under the applicable Acts no protest was necessary to recover 1918 taxes paid in 1922, the suit ~~evidently~~ having been brought ~~after~~ before the 1924 Act was passed. On the other hand, in *Herbert Du Puy v. United States,* 67 C. Cls. 348, 35 F. (2d) 990, 1000 (1929, Green, J.), the Court of Claims held that taxes paid in 1921 without protest could, for that reason, among others, not be recovered. On the opinion in that case, the court decided the related case of *Amy H. Du Puy v. United States,* ~~68 C. Cls. 574~~, 35 F. (2d)

990 (1929, per curiam). Certiorari was denied in both cases, 281 U. S. 739 (1930). Nevertheless, in *Hyatt Roller Bearing Co. v. United States,* 70 C. Cls. 443, 43 F. (2d) 1008 (1930, Littleton, J.), the Court of Claims held that failure to pay under protest was not a bar to suit brought ~~after~~ before June 2, 1924. On this point, the opinion is carefully reasoned and refers to *Farmers Loan & Trust Co. v. United States, supra,* but not to *Du Puy v. United States, supra.* The opinion, however, was by the entire court,* while the decisions in the *Du Puy* cases were not participated in by Judges Williams and Littleton. It is fair to state, therefore, that the later case reflects the opinion of the Court of Claims.

In *Nichols v. Leach,* 42 F. (2d) 918 (D. Mass., 1930, Brewster, D. J.), the court likewise ruled the protest and duress point in favor of the taxpayer. The decision was reversed on other grounds, the opinion making no mention of this point, which apparently was not pressed on behalf of the Collector. *Nichols v. Leach,* 50 F. (2d) 787 (1931, Wilson, Circ. J.). The opinion of this court affirming the latter decision likewise contains no reference to the point, which appears not to have been argued. *Leach v. Nichols,* 285 U. S. 165 (1932, McReynolds, J.).

In *Weir v. McGrath* and *Weir v. Dean,* 52 F. (2d) 201 (S. D. Ohio, 1928, Hickenlooper, D. J., now Circ. J.), the court carefully examined the question now raised and, we submit, fully refuted the arguments suggested below in the case at bar. The decision was adopted as authoritative by the Treasury Department, which published it as Treasury Decision 4210, Cumulative Bulletin VII-2, p. 338. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment per curiam, 41 F. (2d) 1021 (1930).

* See original opinion.

In *Electric Storage Battery Co. v. McCaughn,* 52 F. (2d) 205 (E. D. Pa., 1931, Kirkpatrick, D. J.), the court held that taxes paid prior to 1924 were recoverable, though not paid under protest or duress. The opinion refers, at page 209, to the decision of Judge West in *Willard Storage Battery Co. v. Routzahn* (Dec. 16, 1929, N. D. Ohio, unpublished). Both Collectors appealed, but neither raised the point on appeal that suit was barred because the taxes involved had not been paid under protest or duress. In the former case the judgment has been affirmed. *McCaughn v. Electric Storage Battery Co.,* C. C. H., 1933, Vol. III, par. 9098 (C. C. A., 3rd Circ., Buffington, Circ. J.). The opinion makes no reference to protest or duress. The decision of the Circuit Court of Appeals for the Sixth Circuit in the *Willard* case has not yet been rendered.

In *Clift & Goodrich, Inc. v. United States,* C. C. H., 1931, Vol. III, par. 9439 (S. D. N. Y., Knox, D. J.), the court held that suit to recover taxes paid without protest prior to the 1924 Act could not be recovered in a suit against the United States. We are informed that the point was raised by the judge without suggestion from counsel. On motion for a reargument the court, being informed of the opinion previously expressed in *Winant v. Gardner, supra,* by the Circuit Court of Appeals for the Second Circuit, withdrew the opinion mentioned and granted leave to the petitioner to file an amended petition. C. C. H., 1931, Vol. III, par. 9492. The taxpayer having subsequently elected to stand on its petition, a final judgment was rendered against it, which was affirmed by the Circuit Court of Appeals for the Second Circuit. 56 F. (2d) 751 (1932, L. Hand, Circ. J.). This court denied certiorari, 53 S. Ct. 17 (1932). The opinion of the Circuit Court of Appeals refers to Section 3226 R. S. (26 U. S. C. A., Section 156).

but holds that section to be inapplicable. This was not because the tax was paid prior to June 2, 1924, but because it was paid not by a taxpayer in discharge of his own taxes but by a volunteer in discharge of another's taxes. Such payments must still be made under protest and duress to be recoverable.[3]

In *Moses v. United States,* 61 F. (2d) 791, 794 (C. C. A., 2nd Circ., 1932, Swan, Circ. J.), the point was mentioned but assumed in favor of the taxpayers, judgment against whom was affirmed. That decision is pending before this court on application for certiorari at No. 821.

The case of *Arthur C. Harvey Co. v. Malley,* No. 537 October Term, 1932, in which this court affirmed a judgment against the taxpayer, is stated to have involved this point. Neither the District Court, however, nor the Circuit Court of Appeals appears to have entertained the question, and it was not mentioned nor passed upon by this court in affirming the judgment.

Some reliance has been placed by the Government on *Harrison v. Lewellyn,* 28 F. (2d) 910 (W. D. Pa., 1928, Gibson, D. J.), affirmed on other grounds, 35 F. (2d) 283 (C. C. A., 3rd Circ., 1929, Woolley, Circ. J.), and on *Rasmussen v. Brownfield-Canty Carpet Co.,* 31 F. (2d) 89 (C. C. A., 9th Circ., 1929, Gilbert, Circ. J.). The former case was decided by the same court which decided *Beatty v. Heiner, supra,* though by a different judge, and does not mention that decision. It appears to turn on the authority of *Semple & Co. v. Lewellyn,* 1 F. (2d) 745 (1924), decided by the same judge, hold-

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[3] Wourdack v. Becker, 55 F. (2d) 840 (C. C. A., 8th Circ., 1932; Van Valkenburgh, Circ. J.), cert. den., 284 U. S. 548 (1932); Ohio Locomotive Crane Co. v. Nauts, C. C. H., 1932, Vol. III, par. 9437 (N. D. Ohio, Hahn, D. J.).

ing that a Collector is not liable in a suit to recover taxes collected by the Commissioner by credit. The reasoning of the court assumes that a suit against the United States could have been maintained, and therefore the decision presupposes that the taxpayer in the case at bar is right. The decision in the *Rasmussen* case respecting the amount paid the Collector on January 8, 1924, and applied by him in discharge of a tax liability designated by the plaintiff is made to turn on the statute of limitations prescribed in Section 252 of the Revenue Act of 1921 (42 Stat. 227). This ground of the decision is difficult to understand, the section referred to having been repealed by Section 1100 of the Revenue Act of 1924 as of January 1, 1924. Reference was made to the fact that payment was not made under duress but was voluntary, but no consideration appears to have been given to the provisions of Section 3226 R. S. as amended.

It is therefore submitted that the decisions against the position now taken by the Government in the case at bar, coupled with the long acquiescence of its officers in those decisions, and coupled with the reenactment of Section 3226 R. S. as amended without change in the Revenue Act of 1926, should impel the court to reverse this judgment. This taxpayer and other taxpayers whose suits are still pending or not yet brought should not be subjected to the hardship of the ancient evil which Congress has declared shall no longer stand in the way of justice.

The practice of the Government of not persisting in the defense (except in occasional instances) that the tax was not paid under protest or duress in suits involving taxes paid prior to June 2, 1924, was, we submit, fully justified apart from the authorities above set out,

in view of the plain language of the provision under consideration, construed in the light of established principles. Section 3226 R. S., as reenacted by Section 1113 (a) of the Revenue Act of 1926, is a provision of general application relating to suits or proceedings for the recovery of internal revenue taxes. A construction of the section as applying to such suits or proceedings thereafter brought would be the natural construction. The precaution taken by Congress in subdivision (b) of Section 1113, Revenue Act of 1926, as in subdivision (b) of Section 1014, Revenue Act of 1924, in providing that the section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924, strongly aids this construction. In *Moses v. United States, supra,* Circuit Judge Swan expressed this opinion, saying (61 F. (2d) 791, 794):

> "Paragraph b of section 1014 expressly declared that the amendment shall not apply to pending suits. The implication is that it shall apply to all subsequent suits even though they relate to taxes paid prior to the enactment of section 1014."

The fact that Congress felt it necessary to take this precaution argues strongly that pending suits would, in its opinion, otherwise be affected. This reasoning was employed in *Brown v. Maryland,* 12 Wheat. (25 U. S.) 419 (1827, Marshall, C. J.) the court saying, at p. 428:

> "The exception was made, because the tax would otherwise have been within the prohibition. If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law giver, the thing excepted would be within the general clause, had the exception not been made, we know no reason why this general rule should not be as

applicable to the constitution as to other instruments."

If, but for subdivision (b), Section 3226 R. S. would be applicable to suits pending at the time of its amendment, *a fortiori* it is applicable to all suits thereafter brought.

This is but a particular application of the maxim *"Expressio unius est exclusio alterius"*, which this court, in *United States v. Arredondo*, 6 Pet. (31 U. S.) *691 (1832, Baldwin, J.), at p. *725, described as "a universal maxim in the construction of statutes". See also *Arthur v. Cumming*, 91 U. S. 362 (1875, Swayne, J.); *Mellon v. United States ex rel. Hill*, 36 F. (2d) 609 (Ct. App. D. C., 1929); *Jones v. H. D. & J. K. Crosswell, Inc.*, 60 F. (2d) 827 (C. C. A., 4th Circ., 1932). *Broom* (*Legal Maxims*, pp. 663, 607 note) says: "No maxim of the law is of more general or uniform application, and it is never more applicable than in the construction and interpretation of statutes."

The construction of Section 3226 as amended should be made in favor of the petitioner for the further reason that it is a provision relating to taxes. It is a familiar principle that tax statutes should, in case of doubt, be construed favorably to the taxpayer and strictly against the Government. *Gould v. Gould*, 245 U. S. 151 (1917, McReynolds, J.); *United States v. Merriam*, 263 U. S. 179 (1923, Sutherland, J.); *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346 (1927, Butler, J.); *United States v. Updike*, 281 U. S. 489 (1930, Sutherland, J.). It will be noted that in *Bowers v. New York & Albany Lighterage Co.* this court construed a tax statute strictly against a Collector. A construction liberal to this taxpayer will not be illiberal to other taxpayers. See *Burnet v. Guggenheim*, ... U. S. ..., 53 S. Ct. 369 (1933, Cardozo, J.).

Moreover, the provision inserted in Section 3226 R. S. by the 1924 amendment, eliminating necessity for payment under protest or duress, was aimed at an old technical rule which, in view of other changes in the laws affecting the liability of the United States either directly or through the Collectors to refund taxes erroneously or illegally collected, had become a useless appendage, operating only in denial of just claims. This was fully recognized by both Congressional Committees in their reports on the bill which became the Revenue Act of 1924. See House Report No. 179, 68th Congress, First Session, pp. 33-34; Senate Report No. 398, 68th Congress, First Session, p. 44. The Senate report stated:

> "Section 1114. The provisions of Section 1318 of existing law have been amended to provide that *after the enactment of the bill* it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums, or penalties paid, that such amounts *shall have been paid* under protest or duress. The fact protest was made has little bearing on the question whether the tax was properly or erroneously assessed. The making of such a protest becomes a formality so far as well advised taxpayers are concerned and the requirement of it may operate to deny the just claim of a taxpayer who was not well informed." (Italics added.)

When the evil sought to be cured by this new provision is considered, it becomes evident that Congress must have intended no limitations on the relief provided except such as it felt necessary, in view of the generality of the provision, to impose in the case of pending suits. "It is an elementary principle of construction that all remedial statutes must be construed with reference to the evils sought to be remedied": *Virginia Coupon Cases*, 25 Fed. 666, 668 (E. D. Va., 1885). See *Beley v.*

Naphtaly, 169 U. S. 353, 360 (1898, Peckham, J.); *Chase v. Erhardt,* 198 Fed. 305, 310 (D. Vt., 1912); *Camunas v. New York & P. R. S. S. Co.,* 260 Fed. 40 (C. C. A., 1st Circ., 1919), at p. 52; *Soper v. Hammond Lumber Co.,* 4 F. (2d) 872 (N. D. Calif., 1915). *Blackstone,* in his *Commentaries on the Laws of England,* (Cooley, 4th ed., Vol. I) at *88, says:

> "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was for which the common law did not provide; and what remedy the Parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy."

The construction contended for by the Government, we submit, preserves the mischief and suppresses the remedy.

Moreover, a remedial statute such as this is should be given retrospective application as one means of suppressing the evil. While an application of Section 3226 R. S. to suits brought after its amendment is not strictly retrospective although the suit relates to taxes paid before the amendment (see *Campbell v. Iron-Silver Mining Co.,* 83 Fed. 643 (C. C. A., 8th Circ., 1897), at p. 645), yet if the construction be regarded as retrospective in its operation, it is nevertheless appropriate in the case of a remedial statute, especially one relating to formal procedure. *Sampeyreac v. United States,* 7 Pet. (32 U. S.) *222 at pp. *239-240 (1833, Thompson, J.); *Seaman v. Bowers,* 297 Fed. 371, 375 (C. C. A., 2d. Circ., 1924); *Larkin v. Saffarans,* 15 Fed. 147 (W. D. Tenn., 1883). This consideration was given con-

trolling force by the Circuit Court of Appeals for the Second Circuit in its first opinion in *Winant v. Gardner, supra* (p. 9), the court saying by Circuit Judge L. Hand:

> "This is a matter between the United States and its citizens, and when it promulgates a rule that it will not insist upon duress and protest as a condition to the recovery of money which by hypothesis it ought not to keep, it seems to us that the policy so declared must be taken as immediately effective, even as reaching to actions then pending. Furthermore, the rule [that statutes are intended only prospectively] does not ordinarily apply at all to statutes which merely effect changes in practice and procedure, *Sampeyreac v. United States,* 7 Pet. 222, *Johannessen v. United States,* 225 U. S. 227, 241, *Hollenbach v. Born,* 238 N. Y. 34, and while the line is hard to draw a priori, the matters here in question appear to us to be more nearly of form than of substance." (Matter in brackets added).

The opinion of the Circuit Court of Appeals, though withdrawn upon consideration of subdivision (b) rendering Section 3226 R. S. as amended inapplicable to pending actions, clearly shows how necessary it was for Congress to insert that saving provision. It is broadly stated that remedial statutes apply to pending actions. See *Lewis' Sutherland Statutory Construction* (2nd ed.), Vol. II, p. 1226; *59 Corpus Juris* 1174-1175; *Campbell v. Iron-Silver Mining Co., supra; Miceli v. Morgano,* 36 F. (2d) 507, 509 (W. D. N. Y., 1929).

The reasoning on which the court below bases its intimation that Section 3226 R. S. as amended does not apply to the suit in the case at bar is that a contrary construction would create a personal liability on the

Collector where none existed before, the court remarking that it was, to say the least, not clear that the provision was intended to, or constitutionally could, have the effect contended for by the taxpayer. The cases relied on by the court are *Fullerton-Krueger Lumber Co. v. Northern Pacific Railway Co.*, 266 U. S. 435 (1925, McReynolds, J.), and *Warner v. Walsh*, 27 F. (2d) 952 (D. Conn., 1928, Burrows, D. J.). As we have shown above, the Government confessed error in the *Warner* case. In the *Fullerton Company* case, the carrier whose liability was affected by the statute had a substantial interest which would have been destroyed. This is not true of the Collector here.

The tax here involved is alleged to have been paid to the Collector in consequence of the assessment by the Commissioner of Internal Revenue of a deficiency in tax for the year 1917. It is beyond question that if judgment should go against the Collector in this case the court would certify, to use the words of Section 989 R. S. (U. S. Code, Title 28, Section 842), not only "that there was probable cause for the act done by the collector" but "that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government".(4) Upon such certification by the

(4) We know of no instance of the refusal of a court to grant a certificate of probable cause to a Collector other than United States v. Frerichs, 22 Fed. 637 (S. D. N. Y., 1885). In that case the Collector had seized property pursuant to the request of a revenue agent who was instructed to make the request by the chief clerk of a supervisor. In the suit against the Collector and also in the seizure case the District Court had denied a motion for a certificate that there was reasonable cause for the act. The order in the latter case denying the motion was affirmed by the Circuit Court, and on writ of error this court held that the order was not reviewable. United States v. Abatoir Place, 106 U. S. 160 (1882, Wood, J.). Nevertheless, it was held that the Commissioner was authorized under Section 3220 R. S. to pay the amount of the judgment against the Collector, and that the taxpayer could, in

court, the personal liability of the Collector would cease and the liability would become in technical fact what it was in substance before, an obligation of the United States. *United States v. Emery etc., Co.*, 237 U. S. 28, 31 (1915, Holmes, J.); *Regla Coal Co. v. Bowers*, 37 F. (2d) 373, 377 (S. D. N. Y., 1929, Mack, Circ., J.). It is respectfully submitted that objections based on the purely formal personal liability of the Collector have no place in a case in which it appears that the certificate exonerating him from liability could not lawfully be refused him.

In prescribing the procedural mechanism for the recovery of internal revenue taxes erroneously or illegally assessed or collected, Congress has regularly disregarded the supposed rights of the Collector, while preserving the right of taxpayers to proceed against him for a personal judgment. Instances of this can be multiplied. Suppose the tax is in fact paid under protest and duress: can the Collector protect himself by retaining the money? No. The law requires him to pay it into the Treasury. Section 3210 R. S. (U. S. C. A., Title 26, Section 140).[5] The only thing accomplished by the

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view of the Commissioner's allowance, recover judgment therefor against the United States in the Court of Claims. United States v. Frerichs, 124 U. S. 315 (1888, Blatchford, J.). In the only instance known to us, therefore, of the refusal of a certificate of probable cause, personal liability of the Collector was not enforced and the judgment was nevertheless paid by the United States.

[5] An act of March 3, 1839 (Ch. 82, Sec. 2), requiring moneys collected for duties paid under protest to be remitted to the Treasury, was held to destroy the personal liability of the Collector in a suit to recover duties so paid. Cary v. Curtis, 3 How. (44 U. S.) *236 (1845, Daniel, J.). "Congress, being in session at the time that decision was announced, passed the explanatory Act of February 26, 1845, which, by legislative construction of the Act of 1839, restored to the claimant his right of action against the collector": Arnson v. Murphy, 109 U. S. 238, 340 (1883, Matthews, J.).

protest is to put the *United States* on notice that the taxpayer intends to proceed to get his money back.[6] A formality the performance of which gives the Collector no opportunity to protect himself against personal liability and whose omission in no way affects his obligation with respect to the tax money in dispute can certainly be waived by Congress on behalf of the United States,[7] which has the only interest in the gesture, and cannot harm the Collector.

Again, has the Collector any control over extensions of the period of limitations upon suits against him? By no means. Congress has often extended the time for filing claims for refund or put it within the power of the taxpayer to bring about an extension by filing waivers.[8] The Collector had no hand in the matter. He could not prevent the continuation of his jeopardy, nor could he extend the time. Waivers were not even filed with

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(6) It was formerly important to preserve the formal consequences of suit against a Collector because only in such a suit could interest on the taxes overpaid be recovered. Kinney v. Conant, 166 Fed. 720, 721 (C. C. A., 1st Circ., 1909, Putnam, Circ. J.); cert. den., 214 U. S. 526 (1909). The distinction from the interest standpoint between a suit against the United States and a suit against a Collector has now been obliterated. Section 177, Judicial Code, as amended by Section 615, Revenue Act of 1928 (45 Stat. 791).

(7) The question whether a Collector was bound by a stipulation made in open court was considered by this court solely from the standpoint of the interest of the United States in the litigation, it being undoubted that private litigants are bound by their stipulations. Tucker v. Alexander, 275 U. S. 228 (1927, Stone, J.)

(8) Section 252, Revenue Act of 1918 (40 Stat. 1057), permitted allowance of claims, if filed within five years from the date the return was due, which would otherwise have been barred under Section 3228 R. S., fixing a limitation of two years upon the filing of such claims. Section 252, Revenue Act of 1921 (42 Stat. 227), repeated this provision. This section was amended by the Act of March 4, 1923, to allow the filing of a claim for 1917 within six years after the return was filed, if

him, but were filed with the Commissioner. A claim for refund having been filed within the period prescribed therefor, as extended by act of Congress or by the filing of waivers, the taxpayer had two years after rejection of the claim within which to sue the Collector. Can the Collector bring about a rejection of the claim so as to hasten the running of time in his favor? Can he insist that a claim be allowed if he thinks it meritorious, and thus avoid "personal" liability? The matter is entirely out of his hands.[9] He has nothing to do with claims except to receive them, make a record of them and transmit them to the Commissioner. Moreover, Congress from time to time has extended the period within which

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a waiver was filed within five years from the due date of the return. By the Act of March 13, 1924, Section 252 of the 1921 Act was amended to make the same provision for 1918 taxes. Section 281 (e), Revenue Act of 1924, provided that, if waivers for the years 1917 and 1918 had been filed within five years after the return was filed, claim for refund thereof might be filed either on or before April 1, 1925, or within four years of payment of the tax. Section 284 (g), Revenue Act of 1926, made elaborate provision, in effect extending the time for filing claims for 1917 and 1918, where waivers had been filed, to April 1, 1926; for 1919 taxes to April 1, 1927; and for 1920 and 1921 taxes to April 1, 1928. Subsequent Revenue Acts contain no provisions extending the time for filing claims for refund.

[9] Under Section 3220 R. S. as amended (U. S. C. A., Title 26, Sec. 149), the refunding of taxes is entrusted to the Commissioner of Internal Revenue. Under Section 3226 R. S. the claim for refund must be "duly filed with the Commissioner of Internal Revenue * * * according to * * * the regulations". Reg. 77, Art. 1252, requires the claim to be filed on Form 843 with the Collector, as did Reg. 74, Art. 1252, Reg. 69, Art. 1302, Reg. 65, Art. 1302, Reg. 62, Art. 1031(a). Recent decisions of this court have established that the claim need not be made on Form 843 nor be filed with the Collector. The latter's part in the matter is ministerial. See Ritter v. United States, 28 F. (2d) 265, 267 (C. C. A., 3rd Circ., 1928).

suits might be brought for the recovery of taxes,[10] and has done so in the case of barred claims.[11] Has it occurred to anyone to object that Collectors were injured? Some such objection was apparently made in *Public Service Corporation of New Jersey v. Herold,* 273 Fed. 282 (D. N. J., 1921), in which the Court held that, although Section 14(a) of the Revenue Act of 1916 allowed claims for refund of taxes illegally collected under the 1909 Act to be presented notwithstanding the expiration of the two year limitation provided for such presentation by Section 3228 R. S., no right was created to sue the Collector, but only a right to file a claim with the Commissioner. This judgment was reversed by the Circuit Court of Appeals, 279 Fed. 352 (C. C. A., 3rd Circ., 1922), although the same court had held prior to the enactment of the 1916 Act (229 Fed. 902) that these same plaintiffs could not recover these same taxes, in a suit against the same Collector, because of failure to file timely claims for refund. It will be noted that the Act of 1916 gave only the right to file claims; from this the Circuit Court of Appeals derived the right of the taxpayers to sue the Collector and recover the very taxes which the same

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(10) Rev. Act of 1921, Secs. 1318, 1319; Act of Mar. 4, 1923, c. 276, Sec. 2 (42 Stat. 1505); Rev. Act of 1924, Sec. 1014(a); see Warner v. Walsh, supra, at 24 F. (2d) 451; Rev. Act of 1924, Sec. 1015, Reg. 65, Art. 1352. Section 3227 R. S., enacted June 6, 1872, operated to extend the time for suit, but the Collector was nevertheless held liable. James v. Hicks, 110 U. S. 272 (1882, Matthews, J.).

(11) Rev. Act of 1921, Sec. 1318. An instance in point is the statute involved in Sage v. United States, 250 U. S. 33 (1919, Holmes, J.). Congress had, by the Act of July 27, 1912, 37 Stat. 240, permitted the recovery of taxes paid under the War Revenue Act of June 13, 1898, if claim therefor was presented not later than January 1, 1914. The court presupposed that suit would lie against a Collector as well as against the United States.

court had previously adjudged not recoverable from him.

Congress has shown a similar disregard of the supposed rights of Collectors in its legislation with respect to interest. Formerly, interest was recoverable in a suit against a Collector from the date of payment of the tax (under protest and duress) to the date of judgment. By Section 1117, Rev. Act of 1926, Congress amended Section 177, Judicial Code (U. S. C. A., Title 28, Sec. 284), so as to allow interest at six per cent. in any judgment of any court rendered (whether against the United States or a Collector) for any internal revenue tax overpayment, from the date of the payment thereof to the date of final judgment. This for the first time placed suits against the United States and suits against Collectors on a parity with respect to interest, and for the first time provided specifically for interest in suits against Collectors.[12] By Section 615 (a), Rev. Act of 1928, Section 177, Judicial Code, was amended so as to provide for interest beyond the date of judgment, "to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner". This enlargement of the Collector's interest liability applied in terms to all judgments thereafter rendered. *Skinner v. Eaton,* 45 F. (2d) 568 (C. C. A., 2nd Circ., 1930), cert. den., 283 U. S. 837 (1931); *Mellon v. United States ex rel. Orono Pulp & Paper Co.,* 50 F. (2d) 1007 (Ct. App. D. C., 1931).

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[12] The Collector was not always held liable for interest from the date of payment, notably in cases of delay by the taxpayer. Taylor v. Treat, 153 Fed. 656 (S. D. N. Y., 1907); see Boston & P. R. Corporation v. Gill, 257 Fed. 221 (D. Mass., 1916). In this respect the 1926 amendment of Sec. 177, Jud. Code, enlarged the liability of Collectors with respect to interest.

Congress has enlarged the liability of Collectors in many more situations than those we have instanced, and has made no effort to protect their supposed rights. Had it regarded these rights as more than formal, doubtless it would have protected them. But it did not permit form to stand in the way of the substantial relief granted, and is not to be presumed to have intended otherwise in this case.

Respectfully submitted,

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